Trimble & Associates, Ltd.

Attorneys at Law

11700 Wayzata Boulevard
Minneapolis, Minnesota 55305
Telephone: 952-797-7477 Facsimile: 952-797-5858

Offices also in:
Walker, Minnesota and
Auckland, New Zealand

Tony P. Trimble
Matthew W. Haapoja
952-797-7477

June 5, 2003

Lawrence H. Norton, General Counsel
General Counsel's Office
Central Enforcement Docket
Federal Election Commission
999 E Street NW
Washington, DC 20463

Re: MUR 5181
Spirit of America PAC and Garrett M. Lott, as Treasurer
Ashcroft 2000 and Garrett M. Lott, as Treasurer

Dear Mr. Norton:

Enclosed please find the response of the above-named Respondents in the above-named MUR to the April 23, 2003 finding of probable cause issued by the Federal Election Commission General Counsel's Office. Please contact either of the undersigned with any questions. Thank you.

Very truly yours,

Tony P. Trimble

Tony P. Trimble
Matthew W. Haapoja
\mh

cc: Benjamin L. Ginsberg, Patton Boggs LLP (w/encl.)
Garrett Lott, Executive Director, Spirit of America (w/ encl.)

G:\corp\spirit of America\norton ltr.doc

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of Spirit of America PAC and Garrett Lott, as Treasurer; Ashcroft 2000 and Garrett Lott, as Treasurer	} } } } }

BRIEF OF RESPONDENTS SPIRIT OF AMERICA, ASHCROFT 2000 AND GARRETT M. LOTT, AS TREASURER, IN RESPONSE TO THE GENERAL COUNSEL'S BRIEF

Respondents Spirit of America PAC ("SOA"), Ashcroft 2000 and Garrett M. Lott, their Treasurer, (collectively, "Respondents") hereby submit the following Brief in Response to the General Counsel's Brief ("GC's Brief"). The undersigned counsel hereby submit this joint Brief on behalf of each of SOA, Ashcroft 2000 and Garrett M. Lott for reasons of judicial efficiency; however, each of SOA, Ashcroft 2000 and/or Garrett M. Lott retain the right to further proceed in this matter independently and with separate counsel (or on their own behalf) if any such Respondent deems such action necessary or proper, in each such Respondent's sole and absolute discretion.

I. Statement of Facts

The Complaint filed in this matter by Common Cause and others alleged that SOA, a multicandidate political committee under the Federal Election Campaign Act ("FECA"), made an excessive contribution to former Senator John Ashcroft's authorized committee, Ashcroft 2000. The GC's Brief agrees with the Complaint's allegations and recommends that the Federal Election Commission ("FEC" or "Commission") find probable cause that Respondents violated the FECA, but based on two alternative theories.

The first theory is that SOA and Ashcroft 2000 are so closely related as to constitute the same committee under the FEC's affiliation regulations. Pursuant to this theory, the committees share a single limit on both contributions received from individuals and other federal political committees as

well as those made to other committees. Transfers, however, between SOA and Ashcroft 2000 may be made in an unlimited amount so long as the committees declare their affiliation on their respective FEC Statements of Organization and report such transfers on their respective reports. The purported violation, therefore, arises from the committees having received or made contributions in excess of the federal limits. The GC's Brief is the first notice Respondents have had of this theory.

The second theory more closely tracks the Complaint. Under this theory, SOA made an excessive in-kind contribution of its contributor/supporter lists to Ashcroft 2000. According to the GC's Brief, the initial "transfer" of SOA's contributor/supporter lists to Ashcroft 2000 constituted an excessive in-kind contribution from SOA to Ashcroft 2000. Additionally, the receipt by Ashcroft 2000 of income generated from the rental of certain contributor/supporter lists to third parties also constituted an excessive in-kind contribution from SOA. No specific dollar amount is presented in the GC's Brief for the value of this allegedly excessive contribution, although it provides estimates as to the total amount spent by SOA in generating its lists of contributors/supporters through direct mail fundraising efforts.

Both the affiliation and excessive contribution theories advanced by the General Counsel ("GC") turn entirely on the view that equivalent value was not exchanged between former Senator Ashcroft and SOA. Respondents vigorously dispute this contention. The transactions at the heart of this matter, each represented by a written agreement memorializing the intent and understanding of the parties to each transaction, are described below.

Purpose / Activities of Spirit of America

SOA's purpose was to support conservative Republican candidates for federal office throughout the United States in the 1998 election cycle by making contributions to these candidates. *See* Transcript of Deposition of Jack Oliver dated February 27, 2003 ("Oliver Deposition"), a copy

of which is on file with the Commission's Office of General Counsel, at 12. In 1998, SOA vigorously pursued and accomplished these goals by contributing approximately $63,000 to federal candidates. SOA also engaged in direct mail fundraising, utilizing the name and likeness of Senator Ashcroft. SOA chose Senator Ashcroft for endorsement of SOA's activities because he was prominent in the conservative Republican community, and Jack Oliver, SOA's Executive Director, believed that Senator Ashcroft's endorsement of SOA would boost the committee's fundraising efforts. *See* Boyce Warfield Aff. at ¶ 5; *see also* Oliver Deposition at 26.

Work Product Agreement between SOA and Senator Ashcroft

SOA and Senator Ashcroft entered into a Work Product Agreement ("WPA") dated July 17, 1998, pursuant to which Senator Ashcroft permitted SOA to use his name and likeness in fundraising solicitations in exchange for the work product[1] derived from SOA's use of Senator Ashcroft's name and likeness. The WPA reflected a written memorialization an oral understanding between Senator Ashcroft and SOA that began in early 1998. *See* Oliver Deposition at 45-46, 60.

Pursuant to the oral understanding between Senator Ashcroft and SOA, memorialized in the WPA, each of the parties received equivalent consideration: SOA received the benefit of the use of the name and likeness of Senator Ashcroft, and Senator Ashcroft received the right to the work product derived from the use of his name and likeness. Senator Ashcroft did not receive any other compensation from SOA (no percentage of funds raised, no outright compensation, etc.); rather, his sole compensation was the right to the work product resulting from SOA's fundraising efforts using his name and likeness.[2]

[1]Work product is defined in the WPA as "mailing lists, lists of supporters of and contributors to SOA, lists of prospective contributors to SOA, results of polling data, and any and all other data and documentation regarding SOA or John Ashcroft."

[2]*See* GC's Brief, p. 26, lines 14-16.

As stated above, Senator Ashcroft's endorsement of SOA provided significant value to SOA because Senator Ashcroft was well-known and respected in the conservative Republican community, which community was the target universe for SOA's fundraising efforts. Without Senator Ashcroft's participation, SOA's fundraising efforts would have been less successful; Boyce Warfield Aff. at ¶ 6; as such, the use of Senator Ashcroft's name/likeness added value to SOA's direct mail solicitation efforts. *Id.* at ¶ 5. In exchange, Senator Ashcroft received the work product derived by SOA from its use of Senator Ashcroft's name/likeness in these solicitations[3].

List License Agreement between Ashcroft 2000 and Senator Ashcroft

Through a List License Agreement effective January 1, 1999 between Ashcroft 2000 and Senator Ashcroft (the "LLA", which LLA is part of the record in this matter), Senator Ashcroft granted to Ashcroft 2000 a non-exclusive license to use certain intellectual property owned by him (defined therein as "Data").

This Data included work product owned by Senator Ashcroft pursuant to the WPA, but it also, on the information and belief of Garrett Lott, included names and addresses independently owned by Senator Ashcroft and/or generated by Senator Ashcroft through permitting other entities to use his name and likeness in their fundraising efforts. The deposition testimony of Jack Oliver and Bruce Eberle identifies at least two (2) sources of contributor names/addresses obtained by Senator Ashcroft through agreements permitting other entities to use his name/likeness in fundraising efforts in exchange for the work product derived from the use of Senator Ashcroft's name/likeness.

---

[3]SOA *a fortiori* owned the names/address of contributors/supporters, which information was also necessary to enable SOA to comply with FECA record-keeping and reporting requirements. Rosann Garber described the direct mail industry practice whereby an entity that rents a list of names from another entity owns the names of the contributors/supporters that respond favorably as follows: "[I]n the list business when you rent or exchange a list if someone on the list that you are renting or exchanges, gives to or answers to your solicitation, you get to keep that name. Garber Deposition at p. 34, lines 7-11.

Jack Oliver indicated that Senator Ashcroft and the National Republican Senatorial Committee ("NRSC") had entered into an (oral) arrangement whereby Senator Ashcroft owned the work product resulting from fundraising solicitations on behalf of the NRSC utilizing Senator Ashcroft's name and likeness. Oliver Deposition at 76-77. Additionally, the GC's Brief at footnote 45 on page 30 describes the "Conservative Hotline", a list of names obtained by Senator Ashcroft from lending his name and likeness to other organizations:

> Bruce Eberle described the Conservative Hotline as a list consisting of individuals responding to fundraising letters signed by Mr. Ashcroft for other organizations [organizations other than SOA or Ashcroft 2000].

See Deposition of Bruce Eberle dated March 25, 2003 ("Eberle Deposition Vol. I") at 43-45; *see also* Deposition of Bruce Eberle dated March 28, 2003 ("Eberle Deposition Vol. II") at 10-11. Garrett Lott also testified as to his belief that the Data included names obtained by Senator Ashcroft from his 1994 campaign and other sources. Deposition of Garrett Lott ("Lott Deposition") dated February 28, 2003, at 100-101.

Thus, the Data licensed by Ashcroft 2000 from Senator Ashcroft included contributors and supporters obtained by Senator Ashcroft from SOA (through the WPA) as well as additional names obtained and owned by Senator Ashcroft from non-SOA sources, including the NRSC, various conservative and Republican organizations through the "Conservative Hotline" and Senator Ashcroft's 1994 Senatorial campaign. Under the LLA, Senator Ashcroft gave Ashcroft 2000 the right to use the Data, including the right to "sell, transfer, assign, license or sublicense the Data" to third parties, in exchange for the ownership by John Ashcroft (as co-owner with Ashcroft 2000) to all ensuing work product derived from the Ashcroft 2000's use of the licensed Data".

Nothing in the testimony of Jack Oliver or Garrett Lott indicates that the LLA operated as anything other than a standard list exchange agreement in practice, and the GC's Brief has introduced

no evidence whatsoever that indicates that the LLA (as drafted or as applied by the parties to their relationship) is *not* a standard list exchange agreement of the type the FEC has found does not raise FECA contribution limit implications. Indeed, this type of list exchange is a common practice. Boyce Warfield Aff. at ¶ 4. "When such exchanges of equal value occur, . . . no 'contribution, donation, or transfer of funds or any other thing of value' takes place under 2 U.S.C 441i(a), 11 CFR 300.10(a), or any other provision of the Act or the Commission's regulations." AO 2002-14 (Libertarian Party).

Deposition of Bruce W. Eberle

The GC's Brief gives undue weight to the deposition testimony of Bruce Eberle, particularly in the reliance on Bruce Eberle's opinion as to whether equivalent consideration was exchanged between Senator Ashcroft and SOA through the WPA. First and foremost, it is clear from the Eberle Deposition (and the depositions of Jack Oliver and Garrett Lott) that the relationship between SOA, Ashcroft 2000, Garrett Lott and Bruce Eberle was quite strained. After all, SOA and Ashcroft 2000 were lucrative clients of Eberle & Associates, and these contractual relationships were terminated by Garrett Lott. Bruce Eberle showed his animosity toward SOA, Ashcroft 2000 and Garrett Lott in his deposition when describing termination of the contracts between Eberle & Associates and SOA and Ashcroft 2000 by Garrett Lott:

Q: Can you tell me what this is [showing witness Exhibit No. 22]?

A: It's a termination letter sent by FAX from Garrett Lott to me at our office.

Q: And what prompted Garrett Lott to send this letter?

A: Stupidity.

(Eberle Deposition, Volume II at 58.)

In fact, Eberle & Associates was terminated by SOA and Ashcroft 2000 for licensing SOA's

names to an unauthorized entity, namely, the Paula Jones Legal Defense Fund. The GC's Brief references this termination at pp. 12-13 by citing the testimony of John Ashcroft at his Senate confirmation hearing for U.S. Attorney General. Bruce Eberle's testimony in relation to SOA, Ashcroft 2000, and Garrett Lott must therefore be read in light of the contentious relationship likely created due to the loss by Bruce Eberle of two lucrative clients during campaign season.

Moreover, Bruce Eberle's testimony does not support the innuendo that the WPA arrangement was unusual or not customary in the direct mail field as characterized in the GC's Brief. Footnote 36 on page 26 of the GC's Brief states, "Bruce Eberle, who has been in the direct mail business since 1974, testified that he had not seen another exchange like that reflected in the WPA". This testimony, on its own, proves nothing other than the fact that Bruce Eberle has never seen a provision in a direct mail agreement like the provision in the WPA. Because this answer was not further explored by the FEC, it can by no means serve as evidence of a sweeping survey of the direct mail business, and this incomplete testimony is therefore unpersuasive as to whether equivalent consideration was exchanged between SOA and Senator Ashcroft.

Moreover, the conclusion of the GC's Brief that Bruce Eberle did not know of any other arrangements whereby a client would retain ownership of work product in exchange for use of the client's name/likeness is contradicted by Bruce Eberle's description of the "Conservative Hotline" (*see* p. 5, *supra*). Notwithstanding Bruce Eberle's answer, Bruce Eberle was in fact aware that Senator Ashcroft retained work product resulting from the use of his name/likeness by groups *other than* SOA and Ashcroft 2000.

Bruce Eberle's description of Senator Ashcroft's arrangement with respect to the Conservative Hotline (specifically, the Ronald Reagan ranch historical trust and additional organizations whose identity Bruce Eberle could not recall) is additional evidence that the

arrangement between Senator Ashcroft and SOA relating to work product was a commercially reasonable transaction with equivalent consideration. However, this exculpatory and contradictory evidence is not accurately discussed in the GC's Brief.

II. The use of the traditional affiliation criteria is misplaced in the context of the relationship between an associated authorized committee and leadership PAC.

The GC's Brief sets forth a legal theory not heretofore raised in this matter, *i.e.*, that SOA and Ashcroft 2000 are "affiliated" committees subject to a single contribution limit from individual contributors and a single limit on contributions by these committees to other federal political committees. In support of this contention, the GC's Brief set forth several facts and circumstances in light of the Commission's affiliation regulations. With respect to the relationship between an officeholder's authorized committee and leadership PAC, the Commission's affiliation regulations are not immediately relevant to the question of whether these two types of associated committees are "affiliated."

The GC's Brief leaves the reader with the impression that since 1986 the Commission has determined, on a "case-by-case" basis, whether an authorized committee and an associated leadership PAC are affiliated, utilizing the traditional affiliation criteria in 11 CFR 100.5(g)(4)(ii). The Commission's recent Notice of Proposed Rulemaking on Leadership PACs ("NPRM-LP"), 67 Fed. Reg. 78754 (Dec. 26, 2002), provides a different picture, one that began in 1978 with AO 1978-12 and included MURs 1870, 2897 and 3740, and AOs 1990-16 and 1991-12. In each case, the Commission's affiliation factors were ignored and instead the purpose of the two associated committees was examined. The NPRM-LP acknowledged that after a 1986 NPRM the Commission "maintained its existing policy [which it also stated was its "current approach"]: committees formed or used by a candidate or officeholder to further his or her campaign are affiliated; those formed or used for other purposes are not." 67 Fed. Reg. at 78755 (emphasis added). Alternative C of the

proposed rules would "largely continue the Commission's current treatment of leadership PACs," *id.* at 78757, by focusing on the "actions of the committees involved." *Id.* It "frames the issue in terms of whether a leadership PAC is an authorized committee of a candidate or officeholder rather than whether it is affiliated with that person's authorized committee." *Id.* at 78756 (emphasis added).

Consequently, the two theories advanced in the GC's Brief merge and turn on the single issue of whether Senator Ashcroft used SOA to further his campaign or, in other words, whether SOA made an in-kind contribution to Senator Ashcroft for the purpose of unduly benefiting Ashcroft 2000. That issue, in turn, is determined by a single criteria: was the value of SOA's contributor/supporter lists the usual and normal charge that a multi-candidate committee would give in exchange for the use of Senator Ashcroft's name?

III. The General Counsel has failed to meet its burden of showing that there is probable cause to believe that Senator Ashcroft's name and likeness was less than the usual and normal charge for the use of SOA's contributor/supporter lists.

As set forth above, Senator Ashcroft and SOA entered into the WPA that granted Senator Ashcroft all right, title and interest in and to the work product resulting from SOA's use of Senator Ashcroft's name and likeness. These rights, of course, include the right to sell or license this work product to third parties (including Ashcroft 2000), which Senator Ashcroft did through the LLA. The GC argues, assuming it to be a condition precedent, that the WPA was not an arms-length, bargained-for exchange of value. If this was true, it is also irrelevant as evidenced by the GC's failure to provide any legal authority. The value of in-kind contributions is determined solely by the usual and normal charge as determined by the price of the goods at issue in the market from which they ordinarily would have been purchased at the time of the alleged contribution. 11 CFR 100.52(d). With respect to the exchange of mailing lists, the only consideration is whether the list

exchange was of equal value. AO 2002-14. The GC has failed to meet its burden of showing that it was not.

The GC Brief's contention that the vendor agreements between SOA and its direct mail vendors (Eberle & Associates and Precision Marketing, Inc.) fail to address Senator Ashcroft's ownership of the work product resulting from SOA's fundraising efforts utilizing those vendors is wholly irrelevant. The vendor agreements simply memorialize the relationship between SOA and its vendors, not SOA and third parties such as Senator Ashcroft. Thus, *vis a vis* SOA and Eberle & Associates, for example, SOA owned the work product resulting from the mail generated by Eberle & Associates on behalf of SOA (and likewise *vis a vis* SOA and Precision Marketing, Inc.). However, *vis a vis* SOA and Senator Ashcroft, the WPA granted Senator Ashcroft ownership of the work product (while SOA, of course, also *a fortiori* owned the names and addresses of its contributors and supporters that favorably responded to fundraising mailings, as described at fn. 3 *supra*).

Additionally, as described in Section I, *supra*, the (acrimonious and unreliable) testimony of Bruce Eberle cited in the GC's Brief at fn. 36 (at p. 26), is not dispositive of whether equivalent consideration was exchanged between Senator Ashcroft and SOA through the WPA. The Boyce Warfield Affidavit indicates that it is common practice of well-known political candidates and officeholders of all political parties to lend their name/likeness to fundraising solicitations by various organizations in exchange for the work product resulting from such efforts. *See also* Oliver Deposition at 34, 43-44, 84-85. In other words, the provision of one's name and likeness in exchange for the work product resulting from the use of such likeness is equivalent consideration. After all, without the use of the celebrity's name and likeness, it is quite possible that the work product (*i.e.*, contributor and support names) may not exist at all, because the organization

conducting the solicitation is cashing in on the celebrity's stature in the relevant potential contributor universe.

Although this contradictory and exculpatory evidence is not cited in the GC's Brief, it must be considered by the Commission in its determination of whether probable cause exists that SOA and Senator Ashcroft failed to exchange equivalent consideration through the WPA. Ignoring this evidence, the GC argues, based on one circumstance alone, that Senator Ashcroft received more from the PAC in the form of the work product than he gave to the PAC in the form of the use of his name and likeness: SOA had been using Senator Ashcroft's name for several months before the WPA was reduced to writing, and during this time period had mailed approximately 1.2 million fundraising solicitation pieces.

Jack Oliver's uncontradicted deposition indicates that the WPA was a written memorialization of the oral agreement between SOA and Senator Ashcroft pursuant to which Senator Ashcroft permitted SOA to use his name and likeness in SOA fundraising efforts, and SOA provided Senator Ashcroft with ownership of the work product resulting from such use. Oliver Deposition at 79-80. Because the WPA simply memorialized the relationship between SOA and Senator Ashcroft, the execution date is irrelevant to whether SOA and Senator Ashcroft exchanged equivalent consideration while before the parties' agreement was reduced to writing. Moreover, even without this testimony, the GC's argument still provides no evidence that the WPA (or relationship between the parties in actual practice) was not an equal exchange.

MURs 4382 / 4401

Footnote 36 of the GC's Brief (at p. 26) references MURs 4382/4401, which involved former Senator Bob Dole's Presidential Primary Committee. Senator Dole's Primary Committee, like Senator Ashcroft, similarly involved "an open-ended arrangement whereby [a non-profit corporation]

could continue to use Senator Dole's signature as long as it provided mailing lists to the Primary Committee." Contrary to the case here, the GC in MURs 4382/4401 questioned whether the Primary Committee provided anything of value in consideration for mailing lists "since any value associated with Senator Dole's signature would be an asset belonging to Senator Dole, not the Primary Committee." *See* GC's Report regarding these MURs at 15-16.

The FEC found that, even through no formal agreement existed between Senator Dole and his Primary Committee, Senator Dole's signature was his own personal asset, exchanged with the Primary Committee for work product resulting from the use of this asset. With respect to this matter, then, the formal WPA between Senator Ashcroft and SOA provides *further* evidence that equivalent consideration was exchanged in this case. If Senator Ashcroft's name and likeness (including his signature) is Senator Ashcroft's personal asset (as MURs 4382/4401 hold), then the use of this asset by SOA in exchange for Senator Ashcroft's ownership of the work product resulting from the use of this asset constitutes reasonably equivalent consideration, and no FECA violation occurred.

Notwithstanding the foregoing, as in MURs 4382/4401, a significant fundamental issue is at stake if the Commission finds probable cause in this matter based on the GC Brief's arguments. In MURs 4382/4401, the FEC General Counsel held that that the "use of an individual's signature is a unique item with no ascertainable market value," virtually ignoring the plethora of evidence from direct mail experts that it is standard industry practice in the direct mail business to consider the exchange of a signature for the use of names generated thereby to be an equal exchange. *See* GC's Report regarding MURs 4382/4401 at 17. If the Commission's position remains that a person's name/likeness is an asset with no ascertainable market value, then the exchange of names for a prominent officeholder's signature is, by definition, an in-kind contribution. The GC need not offer any further proof in this matter.

Any attempt, however, by the Commission to adopt this rationale without notice and comment to the regulated community would violate the due process rights of Respondents. To formally adopt this position, the Commission must place the regulated community on notice so the community, including Respondents, can modify their behavior accordingly. In this case, Respondents could have engaged in three possible activities to avoid this MUR: (1) SOA could have sold its mailing to Ashcroft 2000 for fair market value; (2) Ashcroft 2000 and SOA could have performed a list exchange of equal value involving multiple names on both sides of the transaction; or (3) Senator Ashcroft could have purchased lists of names from SOA and given the names to Ashcroft 2000. Instead, the FEC General Counsel attempts to play "gotcha" with facts that otherwise demonstrate a permissible, standard list exchange agreement. Due process requires more.

IV. CONCLUSION

Based on the foregoing and the attached Affidavit of Joanna Boyce Warfield, the GC's Brief lacks evidence to substantiate that SOA and Senator Ashcroft failed to exchange equal value through the WPA and their activities throughout 1998 and 1999. Accordingly, Respondents request the Commission to find that no probable cause exists that Respondents violated the FECA, either through affiliation or through an excessive in-kind contribution from SOA to Ashcroft 2000.

Dated: 6-5-03

TRIMBLE & ASSOCIATES, LTD.

Tony P Trimble

Tony P. Trimble, #122555 (MN)
Matthew W. Haapoja, #268033 (MN)
11700 Wayzata Boulevard
Minneapolis, MN 55305
952-797-7477

Counsel for Respondents Spirit of America PAC, Ashcroft 2000 and Garrett M. Lott as their Treasurer